

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
74 WYTHE RESTAURANT COMPANY, LLC	:	ORDER
for Revision of a Determination or for Refund of New York State Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 2013 through February 29, 2016.	:	DTA NO. 850382

Petitioner 74 Wythe Restaurant Company, LLC, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2013 through February 29, 2016.

Petitioner, appearing by Hodgson Russ, LLP (Joseph N. Endres, Esq., of counsel), filed a demand for a bill of particulars pursuant to 20 NYCRR 3000.6 (a) dated March 31, 2023, demanding that the Division of Taxation provide the statutory basis or bases for proposed assessment of sales tax. The Division of Taxation, appearing by Amanda Hiller, Esq. (Aliza Chase, Esq., of counsel), filed a motion, dated April 20, 2023, to vacate the demand for a bill of particulars pursuant to 20 NYCRR 3000.6 (a) (2). Petitioner filed a response on May 19, 2023, which began the 90-day period for the issuance of this order.

Based upon the pleadings, motion papers and other documents filed by the parties, Alejandro G. Taylor, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation’s motion to vacate a demand for a bill of particulars should be granted.

FINDINGS OF FACT

1. Petitioner commenced this proceeding by filing a petition with the Division of Tax Appeals on January 12, 2023. The petition was filed in protest of a notice of determination (assessment ID # L-050377131) dated August 12, 2019, asserting \$547,419.69 in additional tax due from 74 Wythe Restaurant Company LLC (74 Wythe), plus interest and penalty, for the period December 1, 2013 through February 29, 2016.

2. Before filing the petition with the Division of Tax Appeals, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). Following the conciliation conference, BCMS issued a conciliation order, CMS No. 000313802, dated December 30, 2022, denying petitioner's request and sustaining the statutory notice relating to the audit period covering December 1, 2013, through February 29, 2016.

3. The Division of Taxation (Division) filed its answer to the petition on March 22, 2023. On March 31, 2023, petitioner served the Division with a demand for a bill of particulars (Demand) requesting clarification of the statutory basis for the Division's assessment against petitioner. On April 23, 2023, the Division made a motion to vacate the Demand, alleging it seeks evidentiary material and attorney work product rather than an amplification of its answer. On May 19, 2023, petitioner responded that the motion should be denied because petitioner cannot effectively challenge the assessment without knowing the statutory or regulatory basis for the asserted tax due.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure (Rules) permit the use of a bill of particulars in proceedings in the Division of Tax Appeals. Specifically, section 3000.6

(a) of the Rules provides as follows:

“(1) After all pleadings have been served, a party may wish the adverse party to supply further details of the allegations in a pleading to prevent surprise at the hearing and to limit the scope of the proof. For this purpose, a party may serve written notice on the adverse party demanding a bill of particulars within 30 days from the date on which the last pleading was served.

(2) The written demand for a bill of particulars must state the items concerning which such particulars are desired. If the party upon whom such demand is served is unwilling to give such particulars, he or she may, in writing to the supervising administrative law judge, make a motion to the tribunal to vacate or modify such demand within 20 days after receipt thereof. The motion to vacate or modify should be supported by papers which specify clearly the objections and the grounds for objection. If no such motion is made, the bill of particulars demanded shall be served within 30 days after the demand, unless the administrative law judge designated by the tribunal shall direct otherwise.

(3) In the event a party fails to furnish a bill of particulars, the administrative law judge designated by the tribunal may, upon motion, issue an order precluding the party from giving evidence at the hearing of items of which particulars have not been delivered. A motion for such relief shall be made within 30 days of the expiration of the date specified for compliance with the request.

(4) Where a bill of particulars is regarded as defective by the party upon whom it is served, the administrative law judge designated by the tribunal may, upon notice, make an order of preclusion or direct the service of a further bill. In the absence of special circumstances, a motion for such relief shall be made within 30 days after the receipt of the bill claimed to be insufficient.

(5) A preclusion order may provide that it will be effective unless a proper bill is served within a specified time.”

B. As noted above, the Rules permit the use of a bill of particulars in proceedings in the Division of Tax Appeals “to prevent surprise at the hearing and to limit the scope of the proof” (20 NYCRR 3000.6 [a] [1]). An administrative law judge is guided but not bound by the provisions of the New York Civil Practice Law and Rules (CPLR) (*see* 20 NYCRR 3000.5 [a]).

Thus, it is helpful to refer to CPLR 3041, “Bill of Particulars in Any Case,” and caselaw arising thereunder, for guidance.

C. The function of the bill of particulars is to enable the party demanding the particulars to know definitely the claims or defenses that he or she is called upon to meet (*see Johnson, Drake and Piper v State of New York*, 43 Misc 2d 513, 515 [Ct of Claims 1964]). A demand for a bill of particulars may be used to amplify the pleadings, prevent surprise and limit issues, but may not be used to gain disclosure of evidentiary detail that adverse parties will rely upon to prove their claim (*Bassett v Bando Sangsa Co., Ltd.*, 94 AD2d 358, 359 [1st Dept 1983], *appeal dismissed* 60 NY2d 962 [1983]; *State of New York v Horsemen’s Benevolent and Protective Assn.*, 34 AD2d 769, 770 [1st Dept 1970]). Generally, a party need particularize only those matters upon which it has the burden of proof (*Holland v St Paul Fire & Marine Ins. Co.*, 101 AD2d 625 [3d Dept 1984]).

D. In proceedings before the Division of Tax Appeals, a presumption of correctness attaches to a notice of determination and the petitioner bears the burden of overcoming that presumption (*see Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995, citing *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). This assignment of the burden of proof notwithstanding, the Rules provide that the Division’s answer “shall fully and completely advise the petitioner and the division of tax appeals of the defense” (20 NYCRR 3000.4 [b] [2]). It is in this context that the Division may be required to respond to a demand for a bill of particulars to amplify its answer.

E. The Division argues in its motion to vacate the Demand that paragraphs 1 through 4 of the Demand are objectionable in that they seek evidentiary material rather than an amplification of the Division’s answer, seek attorney work product or demand the Division to

particularize issues on which it does not bear the burden of proof. Petitioner's demand is comprised of the following:

“1. With respect to the period December 1, 2013 through February 29, 2016 (the ‘Protest Period’) including any portion thereof, a detailed statement as to whether it is the Division’s position that Petitioner’s receipts at issue are taxable under Tax Law § 1105(d).

2. With respect to the Protest Period including any portion thereof, a detailed statement as to whether it is the Division’s position that Petitioner’s receipts at issue are taxable under Tax Law § 1105(f)(1).

3. With respect to the Protest Period including any portion thereof, a detailed statement as to whether it is the Division’s position that Petitioner’s receipts at issue are taxable under Tax Law § 1105(f)(3).

4. With respect to the Protest Period including any portion thereof, a detailed statement as to whether it is the Division’s position that Petitioner’s receipts are taxable under a provision of the Tax Law other than Tax Law § 1105(d), (f)(1), and (f)(3) and, if answered in the affirmative, identifying such other provision(s) of the Tax Law.”

F. The Division has failed to explain how a request to identify the section or sections of the Tax Law that provide the basis for its rationale to assert sales tax constitutes seeking evidentiary material or attorney work product. While it is true that petitioner bears the burden of proof, and a party need only particularize those issues on which it bears the burden of proof (*see Holland v St Paul Fire & Marine Ins. Co.*), the Division’s refusal to provide the statutory basis for its rationale to assess petitioner runs counter to the Rules of this forum and invites the opportunity for surprise at the hearing. The Division’s answer, left unamplified, falls far short of fully and completely advising petitioner, or the Division of Tax Appeals for that matter, of its defense.

G. The Division's motion for an order vacating petitioner's Demand is denied. Within 30 days of the issuance of this order, the Division shall provide petitioner with particulars of items 1 through 4 as set forth in its demand for a bill of particulars (see conclusion of law "E").

DATED: Albany, New York
August 17, 2023

/s/ Alejandro G. Taylor
ADMINISTRATIVE LAW JUDGE